

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 8, 2007 Session

CYNTHIA J. RIDDLE v. AMOS LEE RIDDLE

Appeal from the Chancery Court for Maury County
No. 02-681 Jim T. Hamilton, Judge

No. M2006-00472-COA-R3-CV - Filed on April 11, 2007

This case concerns child custody determinations following a divorce. Appellant appeals the trial court's ruling designating Appellee as primary residential parent of the parties' two minor children. However, Appellant failed to provide the Court of Appeals with a complete record of the trial court proceedings; specifically, transcripts of two hearings, one after which the trial court made its initial custody determination and the other after which the trial court changed its initial custody determination. Therefore, based on the incomplete appellate record, this Court cannot review the facts and must affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

William K. Lane, III, Franklin, Tennessee, for the appellant, Cynthia J. Riddle.

Barbara J. Walker, Columbia, Tennessee, for the appellee, Amos Lee Riddle.

OPINION

I. FACTUAL BACKGROUND

Cynthia Riddle ("Appellant") and Amos Riddle ("Appellee") were married on June 9, 1984. They separated on October 21, 2002. The parties have three children, two of them minors whose custody is at issue in this case. Appellant filed for divorce on October 31, 2002. In her Complaint, Appellant requested primary custody of the children, with reasonable visitation for Appellee. On December 4, 2002, Appellee filed an Answer, also requesting primary custody of the children. Initially, by Order dated July 14, 2005¹, the trial court declared the parties divorced and designated

¹ The trial court proceedings were delayed by Appellee's military service in Kuwait.

Appellant the primary residential parent. On July 22, 2005, Appellee filed a Motion to Alter or Amend or in the Alternative, For a New Trial, a portion of which is excerpted below:

In support hereof, [Appellee] would state that the Court's findings set forth in Judge Hamilton's May 24, 2005 letter to counsel and which findings were incorporated in the Order entered July 14, 2005 contained findings which were inconsistent with the testimony presented at trial, specifically, as relating to primary residential responsibility of the parties' minor children and other parenting issues. The Court found that the [Appellant] should be the primary residential parent when the children testified that they desired to live primarily with the [Appellee] for reasons they disclosed to the Court.

....

WHEREFORE, the [Appellee] moves this Court for an order altering or amending the Order entered in this cause on July 14, 2005, or in the alternative, granting a new trial.

The trial court granted Appellant's Motion to Alter or Amend or in the Alternative, For a New Trial. The Order, issued September 22, 2005, states as follows:

This case was heard on the 16th day of September, 2005.

....

After the hearing on May 20, 2005, the Court named the mother as primary residential parent for the two children, Travis, age 16 and Cody, age 13. This was a mistake, the Court should have named the father Amos Lee Riddle as primary residential parent. The mother's job requires extensive travel whereas the father, works for the Tennessee National Guard gets off work everyday at 3:30 pm.

....

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED by the Court that the father, Amos Lee Riddle be named primary residential parent for said children and that the residential time for the mother, Cynthia Riddle be determined by the parties.

Appellant appeals, alleging that the trial court erred in granting Appellee's Motion to Alter or Amend or in the Alternative, For a New Trial, by which Appellee was designated the primary residential parent. Appellee alleges that the appeal is frivolous and that the case should be remanded to the trial court to determine damages due him.

II. STANDARD OF REVIEW

The standard of review is the main issue in this case. The Order from the trial court specifically references two hearings: a May 20, 2005 hearing, after which it granted primary custody to Appellant; and a September 16, 2005 hearing, at which the court determined that the primary custody decision following the May hearing was a mistake. However, the appellate record contains

no transcript of either of the trial court proceedings and no Tennessee Rule of Appellate Procedure 24(c) statement of evidence, and therefore this Court has no way of knowing the basis of the trial court's determinations regarding custody. This Court must assume that the trial court made its determination based on facts presented during the hearings, and therefore the incomplete appellate record is fatal to this appeal. "This Court's authority to review a trial court's decision is limited to those issues for which an adequate legal record has been preserved." *Taylor v. Allstate Ins. Co.*, 158 S.W.3d 929, 931 (Tenn.Ct.App.2004).

This Court was faced with a similar situation in *Sherrod v. Wix*, 849 S.W.2d 780 (Tenn.Ct.App.1992). In *Sherrod*, the trial court awarded custody of a divorcing couple's minor son to his mother, and granted visitation rights to his father. The father sought to increase his visitation privileges and wanted custody of his son. The trial court denied the father's custody request and restricted his visitation rights, and the father appealed this determination. This Court stated:

Our ability to deal with this issue is hampered by the absence of either a transcript of the proceedings in the trial court or a statement of the evidence prepared in accordance with Tenn. R. App. P. 24(c)[²].

When a trial court decides a case without a jury, it's [sic] findings of fact are presumed to be correct unless the evidence in the record preponderates against them. Tenn. R. App. P. 13(d). This court cannot review the facts de novo without an appellate record containing the facts, and therefore, we must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings. *McDonald v. Onoh*, 772 S.W.2d 913, 914

² Tennessee Rules of Appellate Procedure 24(b) and (c) detail appellant's responsibility to provide a complete record, stating as follows:

(b) Transcript of Stenographic or Other Substantially Verbatim Recording of Evidence or Proceedings. - If a stenographic report or other contemporaneously recorded, substantially verbatim recital of the evidence or proceedings is available, appellant shall have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal. . . .

(c) Statement of the Evidence When No Report, Recital, or Transcript Is Available. - If no stenographic report, substantially verbatim recital or transcript of the evidence or proceedings is available, the appellant shall prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement should convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal. The statement, certified by the appellant or the appellant's counsel as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 90 days after filing the notice of appeal. Upon filing the statement, the appellant shall simultaneously serve notice of the filing of the appellee, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. Proof of service shall be filed with the clerk of the trial court with the filing of the statement. If the appellee has objections to the statement as filed, the appellee shall file objections thereto with the clerk of the trial court within fifteen days after service of the declaration and notice of the filing of the statement. Any differences regarding the statement shall be settled as set forth in subdivision (e) of this rule.

(Tenn.Ct.App.1989); *Irvin v. City of Clarksville*, 767 S.W.2d 649, 653 (Tenn.Ct.App.1987); *Gotten v. Gotten*, 748 S.W.2d 430, 432 (Tenn.Ct.App.1988).

Sherrod v. Wix, 849 S.W.2d 780, 783 (Tenn.Ct.App.1992).

“The appellant has the primary responsibility to prepare a factual record containing a full, accurate and complete account of the evidence presented at trial.” *In re SLD*, 2006 Tenn. App. LEXIS 267 at *11 (Tenn.Ct.App. April 26, 2006); *See McDonald v. Onoh*, 772 S.W.2d 913, 914 (Tenn.Ct.App.1989). This Court has stated:

Where the issues raised go to the evidence, there must be a transcript. In the absence of a transcript of the evidence, there is a conclusive presumption that there was sufficient evidence before the trial court to support its judgment, and this Court must therefore affirm the judgment. *McKinney v. Educator and Executive Insurers, Inc.*, 569 S.W.2d 829, 832 (Tenn.App.1977). . . . The burden is likewise on the appellant to provide the Court with a transcript of the evidence or a statement of the evidence from which this Court can determine if the evidence does preponderate for or against the findings of the trial court. . . .

Coakley v. Daniels, 840 S.W.2d 367, 370 (Tenn.Ct.App.1992). Further, the Supreme Court of Tennessee has stated:

When a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal. *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn.1983). Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue. *State v. Roberts*, 755 S.W.2d 833, 836 (Tenn.Cr.[sic]App.1988). Absent the necessary relevant material in the record an appellate court cannot consider the merits of an issue. See T.R.A.P. 24(b).

State v. Ballard, 855 S.W.2d 557, 560-61 (Tenn.1993).

This Court has dealt with an incomplete appellate record many times, and the response is always the same:

We note at the outset that the appellate record contains no evidence of the proceedings that took place in the trial court. Husband has submitted neither a transcript of the proceedings nor a Statement of the Evidence under Tennessee Rule of Appellate Procedure 24(c). In addition, Husband did not file a notice that no transcript or statement of the evidence would be filed under Rule 24(d). The appellant bears the primary burden of preparing a fair, accurate, and complete record

on appeal, and the appellee shares some responsibility for ensuring that the record is adequate. *See Jennings v. Sewell-Allen Piggly Wiggly*, 173 S.W.3d 710, 713 (Tenn.2005); *Svacha v. Waldens Creek Saddle Club*, 60 S.W.3d 851, 855 (Tenn.Ct.App.2001). Ordinarily, "[a]n appellant who elects not to file either a transcript or a statement of the evidence will be faced with the practically insurmountable presumption that the record contained sufficient evidence to support the trial court's decision." *Savage v. Hildenbrandt*, 2001 Tenn. App. LEXIS 661, No. M1999-00630-COA-R3-CV, 2001 WL 1013056, at *6 (Tenn.Ct.App. Sept.6,2001). In the absence of a transcript or a statement of the evidence, we ordinarily presume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's decision. *Tallent v. Cates*, 45 S.W.3d 556, 562 (Tenn.Ct.App.2000).

Jackson v. Jackson, 2006 Tenn. App. LEXIS 330, at *7-8 (Tenn.Ct.App. May 16, 2006). Further, "it has long been the law of this State that where the trial court heard proof and the proof is not brought before the appellate court, it is conclusively presumed that there was evidence presented to support the trial court's findings and decree." *Harbour v. Brown*, 1986 Tenn. App. LEXIS 3096 (Tenn.Ct.App. June 20, 1986).

The incomplete appellate record precludes us from going any further into an analysis of the trial court's decision, and we must therefore affirm.

Appellee alleges that Appellant's appeal is frivolous, and that he is therefore entitled to damages. Appellee bases this argument on Tennessee Code Annotated section 27-1-122:

27-1-122. Damages for frivolous appeal.

When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

Tenn.Code Ann. § 27-1-122. With no transcript of evidence and no Tennessee Rule of Appellate Procedure 24(c) Statement of the Evidence, Appellant had no prospect that she could ever succeed. However, this Court declines to hold this appeal to be frivolous.

III. CONCLUSION

The decision of the trial court is affirmed. Costs of the appeal are assessed to Appellant.

WILLIAM B. CAIN, JUDGE